

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION

**NOTICE OF MOTION NO.3806 OF 2003**

IN  
SUMMARY SUIT NO.773 OF 1998

Ram Akbal Mishra ... Plaintiff

V/s.

Shamsuddin Mohd. Hanif ... Defendant

Mr.R.A. Mishra, Plaintiff present in person  
Mr.N.J. D'Monte for Defendant

CORAM: SMT.NISHITA MHATRE, J.

DATED: JUNE 20, 2006

**P.C.:**

. This Motion has been taken out for setting aside the ex-parte decree dated 15.2.1999. The Defendant contends that he came to know that a decree had been passed against him only in July 2003. He explains the delay in taking out the present Motion by stating that he learnt that the decree had been passed only in July 2003. He contacted his advocate who had stopped practising by then and therefore, he was required to engage another advocate. There was thus some delay in approaching this Court.

2. While passing this order, the learned Judge has recorded that the defendant had not entered his appearance to contest the dispute. It appears that this may not be correct since the appearance had been filed on 28.8.1998 by the defendant through Advocate Deepak S. Padwal.

3. However, the version of the Defendant cannot be accepted for more than one reason. The ex-parte decree was passed on 15.2.1999. After this decree came to be passed, the Plaintiffs sought execution of the decree and a notice is taken out for execution being Notice No.570 of 2003. The Defendant though served did not file any reply as observed by the learned Judge while making the notice absolute on 2.12.2003. The Motion was then taken out by the Defendant for setting aside the order of 2.12.2003. This Motion came to be dismissed on 2.3.2006. The learned Judge while dismissing the Motion found that the only point urged on behalf of the Defendant was that the advocate appearing was engaged in the City Civil Court and therefore, the notice was not restored.

4. The present Motion was taken out for setting aside the ex-parte decree and registered only on 23rd December 2003. Several grounds have been made out including that the appearance of an advocate for the Defendant had been filed after the writ of summons was served. The Defendant then has contended the plaintiff ought to have taken out a summons for judgment before a decree could have been passed.

5. In my view, it is necessary for the Defendant to show sufficient cause under Order 37 Rule 4 of the Code

of Civil Procedure that for setting aside the decree and/or execution thereof. In my view, no case has been made out by the Defendant for setting aside the decree. Apart from this, the execution proceedings have not been stayed and the Notice of Motion in that regard was dismissed on 2.12.2003. It is only thereafter that the present Notice of Motion has been filed. Hence, the Motion is dismissed.